STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6778

Investigation into Petitions for Modification of Certificate of Public Good Obligations of Better TV, Inc. of Bennington, FrontierVision Operating Partners, L.P., Harron Communications Corporation, Lake Champlain Cable Television Corporation, Mountain Cable Company, Multi-Channel TV Cable Company, Richmond Cable Television Corporation, and Young's Cable TV Corporation, all d/b/a Adelphia Cable Communications	)	Hearings at Montpelier, Vermont February 27 and 28, 2003

Order entered: 4/11/2003

PRESENT: Michael H. Dworkin, Chairman
David C. Coen, Board Member
John D. Burke, Board Member

APPEARANCES: Richard H. Saudek, Esq.
Cheney, Brock & Saudek, PC
for Adelphia Cable Communications

Seth A. Davidson, Esq.
Fleischman & Walsh, LLP
for Adelphia Cable Communications

Martha Hudak, Esq.
for Adelphia Cable Communications

John J. Cotter, Esq.
for Vermont Department of Public Service

I. INTRODUCTION

On April 28, 2000, the Public Service Board ("Board") issued Certificates of Public Good ("Certificate") for a period of eleven years to Better TV Inc. of Bennington and Mountain Cable Company, two subsidiaries of Adelphia Cable Communications ("Adelphia" or the "Company"), the state's largest provider of cable services.[1] We did this despite extensive evidence that Adelphia had not complied with conditions in its previous Certificates and with provisions of state law. While the Board imposed significant sanctions upon Adelphia for these transgressions, we ultimately concluded that Adelphia was taking steps to address its past problems and, more importantly, that Adelphia could offer important services to many Vermonters. We then said:

> We do so because we anticipate that the fulfillment of the commitments that Adelphia has made in these proceedings will ensure that the Company brings both a first rate set of cable-television offerings and an

1. These Certificates of Public Good covered the majority of Adelphia's cable subscribers. In this petition, Adelphia seeks to modify the conditions applicable to all of its cable systems, not merely those covered by the Certificates issued in Dockets 6101/6223.

> attractive broad-band Internet option to almost a hundred thousand households across Vermont.[2]

Adelphia's most important commitments were to upgrade all of its service territories (except Small Cities of Newport) to 750 MHz capacity by the end of 2003 (which would permit digital cable services and broadband telecommunications service) and to extend its network into unserved areas where population density met certain criteria enumerated by the Board. At that time, we stressed that Adelphia's commitments in these areas was critical, particularly considering the benefits the state was providing to Adelphia in exchange through the issuance of a Certificate. As we stated:

> We begin with the observation that cable television services are of significant importance to hundreds of thousands of Vermonters, both in their private purchasing decisions and as a public community. *Cable television services demand an important and limited public resource, and the state provides that resource with the expectation that great public benefit will be provided in return.*
>
> The demand upon public resources has several aspects, but one is fundamental: cable television services are provided over public rights of way (established for the common good by the threat or reality of eminent domain proceedings). They require the dedicated commitment of a finite and increasingly valuable public resource — the carrying capacity of the poles and conduits set in those public rights of way.[3]

In this proceeding, Adelphia requests that the Board relieve Adelphia of certain aspects of these commitments by modifying the Certificate of Public Good that defines Adelphia's rights and obligations as a cable television operator in Vermont.[4] In particular, Adelphia seeks to have

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2. Dockets 6101/6223, Order of 4/28/00 at 5.
3. *Id*. at 5–6.
4. Adelphia asserted in its initial pleading that the filing of its request for modification

> stays the Board from enforcing the franchise requirements at issue, not only during the Board's initial consideration of Adelphia's modification request, but also during such period of judicial review that may follow a denial of Adelphia's request.

Adelphia Petition at 3–4. This could include *de novo* federal court review. *Cable TV Fund 14-A, Ltd. v. City of Naperville*, 1998 WL 320363 (N.D.Ill. 1998). Vermont consumers, to whom Adelphia is already obligated to extend its infrastructure and provide cable service, are adversely affected by this delay, which is largely caused by Adelphia's past failures. As a matter of comity and so that the fundamental infrastructure that Adelphia has committed to construct can be put in place as rapidly as possible and the important public benefits that led us to grant Adelphia a Certificate of Public Good can be obtained, there would be high value to prompt resolution of these

(continued...)

the Board relax a portion of the Company's commitment to upgrade its cable television system and the standard under which we determine when Adelphia must expand that system to other nearby Vermonters who do not now have cable services available to them. Adelphia says that unanticipated cost increases and increased competition from providers of satellite services represent significantly changed circumstances outside of the Company's control that make Adelphia's compliance with its Certificate "commercially impracticable" and warrant the requested relief. The standard that Adelphia cites and claims to meet is drawn from the Uniform Commercial Code and has been interpreted in numerous cases.[5]

In this Order, we find that Adelphia has not demonstrated that compliance with the terms and conditions of its Certificate of Public Good is "commercially impracticable" as required by 47 U.S.C. § 545 (Section 625 of the Cable Act) or that any basis exists to modify the present terms and conditions of service.[6] In particular, although Adelphia has suggested that it may be difficult to make a profit on a certain sub-set of its total obligations in its Certificate, Adelphia has presented no evidence at all on the fundamental question of how that unprofitability (if correct) relates to the commercial practicability of compliance with the Certificate as a whole. Adelphia's Certificate sets out a comprehensive set of commitments and obligations (not a menu from which Adelphia may choose to accept those components that it prefers), in exchange for which Adelphia has received authorization to operate in Vermont. Even if we accepted Adelphia's testimony as correct, the evidence in the record does not permit us to conclude that loss on particular line extensions renders the overall enterprise commercially impracticable.

This failure is fatal; the cases on the point are numerous and clear: to claim "commercial impracticability" as a defense to breach of contract, the claiming party bears the burden of proof

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4. (...continued)
issues by any such reviewing court.

5. See Lee Russ, Annotation, *Impracticability of Performance of Sales Contract Under UCC § 2-615*, 55 A.L.R. 5th 1 (1998).

6. The theory of "commercial impracticability" is evolved from, but must be distinguished from, "impossibility of performance." We also note that Adelphia makes no claim of the impossibility of fulfilling its obligations. Indeed, such a claim would not be credible on these facts, since "impossibility of performance is recognized in our law only in the nature of the thing to be done, and not in the inability of the party to do it." *Williams v Carter*, 129 Vt. 619 at 623, 285 A2d 935 at 938 (1971).

as to each of several stringent factors (outlined below).[7] Adelphia has failed to address some of these factors and has failed to meet its burden of proof as to others. In addition, a claim of diminished profits — or even a loss — as to some *sub-portion* of a larger contract does not meet the standard in its fundamental sense.

Because Adelphia has failed to demonstrate commercial impracticability, we do not grant Adelphia's request to be relieved from its obligation to expand service to areas identified in Docket 6445,[8] in which the Company committed to specific line extensions. In addition to Adelphia's failure to present persuasive evidence on the commercial practicability of complying with its Certificates, we find that Adelphia has not demonstrated that unforeseen changed circumstances exist that warrant the requested relief. Taken in the most favorable light, Adelphia has shown at most a moderate increase of construction costs and some indefinite possibility that competition from satellite providers offering local broadcast channels may affect revenues from new line extensions, but neither of these events were unforeseen.

Importantly, to the extent that changes have occurred in Adelphia's costs, we conclude that the material elements of those changes were well within the Company's control. Most of the asserted cost increases represent accounting changes by Adelphia, not actual changes in costs. More importantly, had Adelphia complied with the requirements in the Certificates issued in Dockets 6101/6223, Adelphia's commitments in the 1998 Stipulation in Dockets 5847/5886 *and* previous Certificates of Public Good as well as the modified line extension commitments in Docket 6445, Adelphia would already have extended service to the areas identified in Docket 6445. In fact, in 2000, we imposed civil penalties of $80,000 on Adelphia solely because of its failures in the conduct of the House Count surveys that underpin the line extension requirements. Thus, the present obligation to construct many miles of line extensions and the resulting exposure to possible cost increases was caused by Adelphia's failure over more than five years to fulfill its line commitment obligations. The cases are clear: not only does "equity demand clean hands," the Company cannot claim the defense of commercial impracticability when its own

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7. *Id.*

8. Docket 6445, Order of 8/2/2001. In that case, Adelphia committed to the construction of over 1500 miles of line extensions within a 21-month period of time.

actions or misdeeds were the cause of whatever reduction in profits it now faces. It would be counterproductive to reward the Company for its dilatory line extension practices.

Finally, Adelphia has not demonstrated, as required by federal law and the commercial impracticability standard, that the non-occurrence of the changed circumstances was a basic assumption of the Certificate of Public Good. The Board adopted a Construction Factor of $12,000 in Dockets 6101/6223 notwithstanding Adelphia's much higher estimate of construction costs. We did so on the assumption that Adelphia would coordinate its rebuild and line extension efforts to minimize costs. And, although we recognized that construction costs might increase, we specifically placed the risk of cost increases upon Adelphia by prohibiting the Company from modifying the Construction Factor during the upgrade period. Thus, the Board concluded that the non-occurrence of changed construction costs was *not* a basic assumption of the Certificate, but rather was irrelevant to the obligations during the rebuild period. Since the cost estimate put forth by Adelphia was not the primary basis for the Construction Factor the Board required Adelphia to use in 2000, a current change in that cost estimate would not require retroactive relief.

In three areas that are no longer contested by the parties, we grant a part of Adelphia's petition. We will permit Adelphia to defer upgrading limited portions of its system where the existing system now enables customers to receive the full range of Adelphia's present services; however, this deferral of the upgrade will last only until such time as Adelphia deploys new services that require the greater system capacity that Adelphia had promised. In addition, we will permit Adelphia to modify, in one way and beginning with House Count surveys conducted subsequent to the identification of lines in Docket 6445, the manner in which it calculates whether it must extend its lines to serve new customers without additional charges to those customers. Beginning with House Count surveys conducted after the lines identified in compliance with Docket 6445, Adelphia should incorporate more recent calculations of construction costs, but only if it also includes recent revenues that capture all services using

Adelphia's facilities (including PowerLink).[9] Finally, beginning at the same time, we will permit Adelphia to count houses with satellite dishes as one-third of a house.

II. PROCEDURAL HISTORY

On November 12, 2002, a Petition for Modification of Franchise Obligations ("Petition") was filed on behalf of Mountain Cable Company and Better TV, Inc. of Bennington, both d/b/a Adelphia Cable Communications ("Adelphia"). The Public Service Board ("Board") opened an investigation into the Petition on November 21. A further Petition for Modification of Franchise Obligations was filed on behalf of Multi-Channel TV Cable Company, Young's Cable TV Corporation, Mountain Cable Company, Richmond Cable Television Corporation, Lake Champlain Cable Television Corporation, Harron Communications Corporation, and FrontierVision Operating Partners, LP, all d/b/a Adelphia Cable Communications, on November 25. A prehearing conference was held on December 11, 2002, at which the Board approved a motion to consolidate the latter petition into the investigation into the former; hereinafter they will be referred to collectively as "Petitions." The parties also agreed at the prehearing conference that the deadline for a decision on the original Petition should be extended to coincide with the deadline for decision on the second petition pursuant to 47 U.S.C. § 545, and that that date would be April 11, 2003.

Technical hearings were held on February 27 and 28, 2003.

III. LEGAL STANDARD – SECTION 545

The Petitions were filed pursuant to 47 U.S.C . § 545(a). That section says, in relevant part:

> (1) During the period a franchise is in effect, the cable operator may obtain from the franchising authority modifications of the requirements in such franchise—

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9. To be clear, as a result of the settlement in Docket 6445, Adelphia identified more than 1500 miles of line extensions that it must build. The revisions to the Construction Factor and counting of homes with satellite dishes do not apply to that mileage, but only to subsequent House Count surveys.

> (A) in the case of any such requirement for facilities or equipment, including public, educational, or governmental access facilities or equipment, if the cable operator demonstrates that (i) it is commercially impracticable for the operator to comply with such requirement, and (ii) the proposal by the cable operator for modification of such requirement is appropriate because of commercial impracticability . . . .

Subsection (f) of § 545 defines "commercially impracticable" as follows:

> For purposes of this section, the term "commercially impracticable" means, with respect to any requirement applicable to a cable operator, that it is commercially impracticable for the operator to comply with such requirement as a result of a change in conditions which is beyond the control of the operator and the nonoccurrence of which was a basic assumption on which the requirement was based.

IV. ANALYSIS

In this proceeding, Adelphia asks the Board to make several specific modifications to its present Certificate. These are as follows:

> Increase the Construction Factor used in the Qualifying Density (the formula for determining when Adelphia must construct line extensions without customer contribution) from $12,000 to $29,896 for all line extensions not yet built.
>
> Modify the Certificate to treat homes with satellite dishes in unwired areas as one-third of a home when conducting house count surveys.
>
> Modify the Certificate to define Adelphia's system upgrade obligations so that Adelphia would be deemed to have completed its upgrade when it has rebuilt to 750 MHz all of its systems that were below 550 MHz at the time the franchises were granted.

The Vermont Department of Public Service ("Department")[10] recommends that we deny Adelphia's requested modification of the Construction Factor as it applies to line extensions Adelphia committed to construct in the settlement reached in Docket 6445 and approve the remainder of Adelphia's requests, with certain conditions and modifications. Specifically, the Department argues that the Board should adopt a Construction Factor of $23,759 for the next year, permit Adelphia to count houses with satellite dishes as one-third of a house, and defer the

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10. The Department is the executive branch agency charged with representing the interest of the people of the state in proceedings before the Board. It does this through the Director for Public Advocacy.

upgrade of the systems now at 550 MHz until such time as Adelphia deploys new services that require 750 MHz of system capacity.

A. Modification of Construction Factor for Line Extensions Adelphia Committed to Build in Docket 6445

Findings

1. To determine when Adelphia must construct a line extension (without capital contribution from prospective customers) to serve areas adjoining Adelphia's existing facilities, the Board has established the concept of the Qualifying Density. The Qualifying Density is calculated according to the following formula:

$$H = (((C \times T) \div 12) \div R) \div P$$

- C = average cost per mile of line extensions for the entire company in Vermont for the most recent audited period.
- T = annual carrying charges for the Vermont operation for the most recent audited period; annual carrying charges is the sum of Rate of Return, Overhead Expenses, Tax Rate, and Depreciation Rate. These components are all expressed as a percentage of outside plant, *i.e.*, the transmission and distribution system.
- R = average revenues per subscriber per month.
- P = average basic service penetration of homes passed by the plant.

Larkin pf. at 8–9; Docket 6101/6223, Order of 4/28/00 at 119–120.

2. Adelphia is not seeking any modification to the manner in which the values for average subscriber revenue and penetration are calculated; nor is it seeking a change in the previously established value of 31.58% for T, the carrying cost factor. Tr. 2/27/03 at 94, 97 (Snowdon).

3. The Company has so far excluded revenue from PowerLink in its calculation of average subscriber revenue. Tr. 2/27/03 at 95 (Snowdon).

4. Costs of equipment used to provide PowerLink service are included in the Company's calculation of the costs of line extensions. Tr. 2/27/03 at 95 (Snowdon).

5. The Department calculated a value for average subscriber revenue of $42.54 per month. Larkin 1/23/03 pf. at 26.

6. The Department calculated a value of 70.2% for the penetration factor relying on the Company's 2000 report. *Id.* at 30.

Construction Costs

7. In Dockets 6101/6223, Adelphia stated that its costs for a line extension were $20,542 per mile. Nonetheless, the Board required Adelphia to use $12,000 for the Construction Factor until such time as Adelphia completed the upgrade committed to by the Company as part of its renewal application. The $12,000 per mile figure represented the average cost of the upgrade. Dockets 6101/6223, Order of 4/28/00 at 123; Snowdon 12/18/02 pf. at 3; Larkin 1/23/03 pf. at 9.

8. Adelphia now estimates that its cost for a "typical" line extension is $26,688. Exh. Adelphia-5.

9. The estimated $26,688 per mile of line extension is based upon the Company's theoretical "magic mile." Tr. 2/27/03 at 179 (Forrest).

10. Adelphia actually constructs many line extensions that are less expensive than that reflected in the "magic mile." In the 2002 House Count survey, approximately 20% of the line extension that Adelphia has identified for construction would be Type I construction, which costs approximately half of the "magic mile." Larkin pf. at 14–15.

11. The majority of the difference between Adelphia's present $26,688 per mile estimate and the $20,542 estimate in Dockets 6101/6223 relates not to changes in construction costs, but rather to costs that Adelphia previously incurred but did not incorporate in its cost estimate. Exh. Adelphia-5.

Adelphia's Past Performance Related to Line Extensions

12. In Dockets 5847/5886, Adelphia acknowledged that it had failed to comply with various obligations related to line extensions dating back to 1997, including the submission of house count surveys and line extension construction budgets. In addition, Adelphia did not timely perform house count surveys. Dockets 5847/5886, Order of 12/5/97, Attachment A; Dockets 6101/6223, Order of 4/28/00 at 16–18.

13. In Dockets 6101/6223, the Board found numerous flaws in Adelphia's approach to House Count surveys including failure to comply with requirements in its Certificates. As a

result, the Board directed Adelphia to revise past House Count surveys. Order of 4/28/00 at 111–116.

14. On May 31, 2001, Adelphia and the Department executed a Stipulation and Agreement in settlement of Docket 6445, an enforcement action begun in response to a petition filed by the Department on November 2, 2000.[11] *See* exhs. DPS-19 and DPS-13, Tab H at 2.

15. Adelphia admitted it was at fault in not properly conducting house count surveys in the years prior to signing the settlement. Exh. DPS-18 at 15, 21, and 26.

16. The Docket 6445 settlement required Adelphia to develop and establish extensive new procedures for conducting and compiling future House Count Surveys to bring Adelphia's practice into conformance with previous Board orders. The Settlement also required Adelphia to review the 1999 revised survey to identify qualifying extensions that the Company may have missed. Exh. DPS-19 at ¶ 3.

17. Application of the enhanced procedures resulted in Adelphia identifying 1,622 miles of qualifying extensions. Exh. DPS-13, Tab H at 1; exh. DPS-13, Tab G at 1.

18. Adelphia committed, subject to strand mapping, to construction of those extensions within a period of 21 months from June 15, 2001. Letter from Mark Forrest to Charles Larkin. *Id*.

19. Following strand mapping, the 1,622 miles were reduced to 1,523 miles. Exh. DPS-13, Tab J.

20. Since that time, the Company has constructed approximately 338 miles of extensions in Vermont. There are approximately 1,262 miles remaining to be built under the settlement agreement. Tr. 2/27/03 at 168 (Snowdon); exh. Adelphia-3 at 32.

21. When Adelphia signed the Docket 6445 stipulation it unconditionally committed itself to the construction of the subject extensions and did not reserve any rights to itself to modify the

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11. Docket 6445 was an investigation into the Company's alleged lack of compliance with Condition No. 43 of the renewed Certificates of Public Good issued in Docket 6101 on April 28, 2000, and revised on July 19, 2000. Condition No. 43 required the Company to revise its 1999 House Count Survey in compliance with certain specified criteria and to submit the revised product by August 25, 2000. Although the Company filed the revised survey in a timely fashion, the Department contended in Docket 6445 that Adelphia failed to comply with the established criteria in revising the survey. Exh. DPS-13 Tab H at 2.

obligation to construct the extensions. Tr. 2/27/03 at 139 (Snowdon); *see also* exh. DPS-19 generally.

22. The settlement in Docket 6445 was arrived at in an adversarial proceeding, and had the parties been unable to settle the docket, Adelphia was faced with the possibility of significant penalties. Tr. 2/27/03 at 143–44 (Snowdon).

23. Of the 1263 unbuilt miles from Docket 6445, Adelphia first identified them as qualifying for construction in the following periods:

Year	Miles
1997	0.79
1998	9.10
1999	8.14
2000	396.14
2001	752.91
2002	96.50

Larkin pf. at 38–39.

24. The remaining Docket 6445 miles are in large part the result of the Company's historical failure to properly conduct house count surveys and identify and construct qualifying extensions. Larkin 1/23/03 pf. at 37; Docket 6445, Order of 8/2/01 at finding 8; findings 12–23, above.

25. If the Company had more accurately identified and constructed qualifying line extensions over the years, it would have avoided many of the cost increases it now alleges it faces. Larkin 1/23/03 pf. at 16; tr. 2/27/03 at 149 (Snowdon).

26. If the Company had more accurately identified and constructed qualifying line extensions over the years, a greater percentage of the Company's plant would have been subject to the upgrade to the hybrid fiber-coaxial architecture ("HFC") the Company now employs. Larkin 1/23/03 pf. at 34; tr. 2/27/03 at 182–83 (Forrest).

Discussion

As part of its franchise, Adelphia has an obligation to serve not only existing customers within the towns that constitute its service territory, but also to extend service to serve new customers. This obligation stems directly from the regulatory bargain under which cable television service operates. In exchange for the use of valuable resource — "the carrying capacity of the poles and conduits set in those public rights of way,"[12] cable companies are expected to make reasonable efforts to extend their service to customers throughout their service territory. We explained previously that this duty is a fundamental part of Adelphia's obligations under its Certificate.

12. Dockets 6101/6223, Order of 4/28/00 at 6.

> In granting certificates of public good to cable companies, one of the major goals of this Board is to ensure service to as many customers as possible. Many Vermont residents find cable services to be valuable, but if service is limited to a few densely populated areas, Vermonters outside of those areas fail to benefit. Thus, inherent in the principle of the public good is an obligation to make service available to as many customers as possible within a company's service territory.[13]

In some instances, Adelphia may charge customers for some or all of the cost of these line extensions. However, when the density in an area adjacent to Adelphia's existing facilities reaches an appropriate level, Adelphia has committed to, and the Board has required Adelphia to, extend its facilities without customer contribution. This density has been referred to in prior orders as the "Qualifying Density." The Qualifying Density is the result of the following formula which takes into account Adelphia's costs and reasonably expected revenues to determine the average customer density at which Adelphia is likely to earn a fair return on its investment in the new line extension.

$$H = (((C \times T) \div 12) \div R) \div P$$

- H = Qualifying Density
- C = (the "Construction Factor") average cost per mile of line extensions for the entire company in Vermont for the most recent audited period.
- T = annual carrying charges for the Vermont operation for the most recent audited period; annual carrying charges is the sum of Rate of Return, Overhead Expenses, Tax Rate, and Depreciation Rate. These components are all expressed as a percentage of outside plant, i.e., the transmission and distribution system.[14]
- R = average revenues per subscriber per month.
- P = average basic service penetration of homes passed by the plant.[15]

In Dockets 6101/6223, the incorporation of recent figures for each of the inputs to the formula produced a Qualifying Density of 14.[16] Thus, if an area adjacent to Adelphia's existing facilities

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13. *Id.* at 110.

14. In Dockets 6101/6223, the Board fixed the annual carrying charge factor at 31.58% and ruled that it should not be changed on a year to year basis. Order of 4/28 at 117, 120.

15. Larkin pf. at 8–9; Dockets 6101/6223, Order of 4/28/00 at 119–120.

16. Dockets 6101/6223, Order of 4/28/00 at 118; Larkin pf. at 9. Adelphia did not, as required by that Order, submit a recalculation of the Qualifying Density with its annual reports in April of 2002 to reflect increases in revenue. The Department did not object to Adelphia's delay in filing the updated information. Larkin pf. at 9–10.

(continued...)

reaches a density of 14 homes per mile, Adelphia must extend its facilities to that area without customer contribution. Since that time, revenues have increased (as anticipated), producing a lower Qualifying Density.

The most significant aspect of Adelphia's petition for modification of its Certificate is the Company's request that we modify the Construction Factor, which reflects the cost of construction of a mile of line extension in the Qualifying Density formula. In Dockets 6101/6223, Adelphia presented evidence that it argued supported a Construction Factor of approximately $20,000. The Department presented evidence that a reasonable estimate was a little over half of that figure. The Board directed that Adelphia use $12,000 per mile for the Construction Factor until the completion of the facilities upgrade that was the fundamental component of Adelphia's renewal petition, at which time Adelphia could request to change the Construction Factor if circumstances had changed.

Adelphia has not yet completed its facilities upgrade and is barred by its Certificates from adjusting the Construction Factor. Nonetheless, the Company now requests that the Board modify the Construction Factor from $12,000 to approximately $27,000. Adelphia states that compliance with the $12,000 Construction Factor is commercially impracticable and cites to several changed circumstances, all of which Adelphia says were beyond its control and could not have been foreseen, that justify premature alteration of the Construction Factor. First, the Company says that the construction costs have increased significantly from those assumed in Dockets 6101/6223. Second, Adelphia says that it now faces increased competition from satellite dishes since at least one satellite company — Echostar — now offers local broadcast channels as part of its services. Third, Adelphia asserts that changes in the capital market have made compliance with the existing build-out requirements commercially impracticable.

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16. (...continued)
However, the Board has not been asked to approve an extension of the deadlines set out in its Order or otherwise authorize Adelphia to file its recalculation late. Thus, the Company may be in violation of Board Orders. Moreover, this failure, at a time when revenues from PowerLink service have been growing rapidly, could mean that the House Count surveys conducted in 2002 are based upon a lower Qualifying Density than should apply.

1. Commercial Impracticability

We find that Adelphia has failed to show that construction of the Docket 6445 line extensions has become commercially impracticable. Section 625(f) of the Cable Act[17] (quoted above, page 7), sets out the standard that Adelphia must meet. The legislative history of that Section (referred to us by Adelphia's counsel) explains the intent of Congress. That history states:

> 'Commercial Impracticability' is defined as it is the Uniform Commercial Code, Section 2-615. It is intended that this standard will be applied to cable operators' proposals for modification in the same manner that the UCC applies — recognizing that courts may need to make distinctions given the difference between the context in which it is applied here and that regarding the sale of goods which is governed by the UCC. This Standard is meant to cover situations where, for example, particular equipment or facilities required by a franchise has not developed or functioned technologically as anticipated, or is not available; or is available only upon terms sufficiently more burdensome to the operator than when the offer to provide such facilities and equipment was made that courts in similar situations under the UCC have found impracticability; or the equipment or facilities were offered in order to provide services which regulation has prohibited the cable operator from offering. The Committee Notes that the foreseeability of the change in conditions is a key factor for the court to consider under the UCC's doctrine of commercial impracticability.[18]

Section 2-615 of the Uniform Commercial Code, adopted in Vermont as 9A V.S.A. § 2-615, states:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

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17. 47 U.S.C. § 545.

18. H.R. Rep. No. 98-934. Adelphia argues that departure from strict UCC precedent may be appropriate because "the concept of commercial impracticability is being applied to cable televisions franchise requirements rather than contracts for the sale of goods." Adelphia cites *Cable TV Fund 14-A, Ltd. v. City of Naperville*, 1997 WL 280692 (N.D. Ill.) in support of its argument. However, the court in that case, while saying that it was not "confined" to UCC criteria, did not describe the standard for commercial impracticability or the degree to which departure from UCC criteria would be appropriate. And while Naperville may be correct that application of the UCC standard may require discretion in some cases, we note that none of the examples cited in the legislative history are relevant here and that it is still clear that Congress intended us to look at the UCC for guidance, if not necessarily binding, precedent, in determination of the issues before us. In addition, the court was ruling on a 12(b)(6) motion to dismiss, unlike this case which is decided after an opportunity for fact-finding.

> (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

The burden of proving each of the elements required for relief under section 2-615 is upon the party claiming excuse. *Eastern Air Lines, Inc. v. Gulf Oil Corp.*[19], citing *Ocean Air Tradeways, Inc. v. Arkay Realty Corp.*[20] The cases are clear that the fact that a rise in some cost element of performance occurs, even to the point of making the contract unprofitable, is not sufficient to show commercial impracticability. See, e.g., *Missouri Public Service Co. v. Peabody Coal Co.*[21] (where the court declined to relieve Peabody Coal Co. of its unprofitable contract to deliver coal because the court found that the unanticipated contingency of which Peabody Coal complained, the Arab oil embargo, was foreseeable); *Louisiana Power & Light Company v. Allegheny Ludlum Industries, Inc.*[22] (where the court declined to relieve the seller of stainless steel tubing of a $1,127,000 contract on which the seller would lose $428,500, saying "[t]he mere fact that performance under the contract would have deprived Allegheny of its anticipated profit and resulted in a loss on the contract is not sufficient to show commercial impracticability." *Id.* at 1324). The latter case goes on: "(t)he party seeking to excuse his performance must not only show that he can perform only at a loss but also that the loss will be especially severe and unreasonable," quoting *Gulf Oil Corp. v. Federal Power Commission*.[23]

The fact that a company may fail to earn its desired return — or may even take a loss — on some subpart of a larger contractual commitment simply does not constitute commercial impracticability under the UCC. Of course, Adelphia is not attempting to avoid the entire contract, but only to modify a single element. But the analysis under UCC § 2-615 requires that

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19. 415 F.Supp. 429, 438 (D.C.Fla. 1975).
20. 480 F.2d 1112, 1117 (9th Cir. 1973).
21. 583 S.W. 2d 721 (Mo.App. W.D. 1979).
22. 517 F. Supp. 1319 (E.D. La. 1981).
23. 563 F.2d 588, 600 (3d Cir. 1977), *cert. denied*, 434 U.S. 1062, 98 S.Ct. 1235 (1978), *petition for cert. dismissed*, 435 U.S. 911, 98 S.Ct. 1462 (1978).

we examine more than a single subset of costs in determining whether some particular franchise requirement should be reformed. The commercial impracticability defense grows out of the general contract law concepts of frustration of purpose and impossibility of performance. *See* 14 CORBIN ON CONTRACTS § 74.8 (2001). While it is true that the Board bases its Qualifying Density calculation on assumptions that will, on average, allow Adelphia to earn a fair return, a change in circumstances that may only lengthen the time for earning a return on that limited part of the overall franchise does not meet the UCC tests. Significantly, Adelphia presented no evidence that the value of the entire franchise or even of this portion of the contract would be destroyed. As noted in findings 3 and 4, above, the Company included significant costs of PowerLink service in its calculations but ignored revenue impacts directly attributable to those costs; Adelphia also failed to offset the higher costs with cost savings resulting from the change in pole-attachment rates mandated by the Board's revision of Rule 3.700. We recognize that some of these changes would be recognized in the actual calculation of Qualifying Density when it is filed, but they are certainly germane to a discussion of the hardship resulting from a purported change in one factor.

We also note that, while the present case appears to fall within the language of § 545, that may not have been the intent of Congress. The Committee Report on this section says, in part:

> This Standard is meant to cover situations where, for example, particular equipment or facilities required by a franchise has not developed or functioned technologically as anticipated, or is not available; or is available only upon terms sufficiently more burdensome to the operator than when the offer to provide such facilities and equipment was made that courts in similar situations under the UCC have found impracticability; or the equipment or facilities were offered in order to provide services which regulation has prohibited the cable operator from offering.[24]

The changed circumstance of which Adelphia complains is not of the same nature as those mentioned in the Report. Here we do not have a requirement of a particular brand of equipment that is no longer manufactured, or similar really "impossible" condition. Even if we accept

24. H.R. Rep. No. 98-934.

Adelphia's evidence as correct, the result would be that Adelphia is less profitable than it had expected when it repeatedly promised its performance.

2. New Construction Costs

Adelphia's assertion that unforeseen changes beyond the Company's control have occurred relies primarily upon Adelphia's statement that construction costs have increased. Adelphia states that the cost of constructing what it characterizes as "Type 2" line extensions have increased by more than 30 percent.[25] Adelphia observes that it was aware that the $12,000 Construction Factor adopted by the Board "did not reflect the actual cost of line extensions," but states that it was the drastic increase in the actual cost of line extensions that was unforeseen and represents changed circumstances.[26] The Department argues that, to the extent that costs may have increased, the new construction costs, as applied to line extensions identified in Docket 6445, were within the Company's control as Adelphia should have already constructed the line extensions.

The record does not support Adelphia's assertion that construction costs have increased significantly or that the cost increases that occurred were unforeseen. Adelphia's current estimate of line extension costs — $26,000 — is about 30% higher than that considered in Dockets 6101/6223. However, closer examination of the comparison of costs presented by the Company demonstrates that the majority of the difference reflects a change in the manner in which Adelphia assigns costs to line extensions rather than a change in the actual costs. For example, nearly one-third of the increase is due to allocation of in-house labor and fiber overlash that Adelphia states "were never accounted for within the 2000 magic mile."[27] Adelphia now includes many other costs that are not new, but were simply not accounted for in the 1999 cost

25. Adelphia Brief at 16. Adelphia classifies aerial line extensions into three types. Type I line extensions are the simplest and require no fiber optic materials. Type II extensions include fiber optics and are most similar to the Company's "magic mile," the theoretical cost of a mile of hybrid fiber-coax line extension. Type III line extensions add a portion of the cost of a hub site to support the extensions. Exh. Adelphia-3 at 26–30.

26. Adelphia Brief at 17.

27. Exh. Adelphia-5.

estimates.[28] In other areas, the change costs arise from Adelphia's determination that previous estimates did not contain sufficient quantities of certain materials (for example, in the area of electronics). These new costs reflect a change in cost allocation choices by Adelphia or the correction of previous omissions, not actual cost increases. Clearly these costs, even if valid, do not represent changed circumstances.[29]

The remaining cost changes — approximately 15% from 1999 to 2003 — even if real, are not so significant as to require a fundamental alteration of Adelphia's line extension obligations. In fact, we cannot find that cost changes of this magnitude were unforeseeable.[30] While they may exceed the rate of inflation, they do not do so by a large amount.

Adelphia also has not demonstrated that the effect of any cost changes upon the Company's ability to conduct line extensions as Adelphia promised in Docket 6445 and previously was outside of its control. To the contrary, it is clear that the number of miles of line extension Adelphia must build under Docket 6445 is a direct consequence of the Company's actions and that, but for those actions, Adelphia would not now need to build the miles and would be unaffected by any changes in constructions costs. In examining this question, it is helpful to briefly review the events leading up to the current backlog of line extensions.

The Department has raised concerns about Adelphia's line extension practices for a number of years. In large part, these have focused on the manner in which Adelphia conducted its House Count surveys, the timeliness of those surveys, and the time it has taken for Adelphia to translate the results of the surveys into the construction of line extensions required by the Qualifying Density. To address these problems, Adelphia and the Department entered into an agreement in 1996 setting out specific improvements that Adelphia would make to its practices

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28. Adelphia has characterized the earlier projections as the 2000 cost estimates. In fact, they were prepared in the Summer of 1999 and presented in hearings that fall.

29. As Adelphia prepared both cost estimates, the earlier omission also was within the Company's control.

30. In fact, Adelphia has presented no evidence to show that the cost increases were unforeseeable — the Company simply asserts that they were (presumably in reliance on the fact that they exceed the rate of inflation).

and schedules for conducting each year's surveys and committing to construction plans. The Board approved this understanding.[31]

Within a year, the Department alleged that Adelphia was still not meeting its obligations. Again, the Department and Adelphia reached a stipulated agreement, in which Adelphia admitted to various violations of Board Orders and certificates of public good, including conditions related to line extensions.[32] Adelphia agreed to subsequently comply with those obligations.

In less than two years, the Department once again alleged that Adelphia was not meeting its line-extension-related commitments (as well as other obligations). The Board considered these issues in Dockets 6101/6223, at the same time we were determining whether to renew Adelphia's Certificate of Public Good for a further eleven-year period. The Board found that Adelphia had not complied with its Docket 5847/5886 commitments and imposed substantial civil penalties upon Adelphia — $80,000 — precisely because of the past failures to comply with line extension related conditions in Certificates of Public Good.[33] We concluded that:

> Adelphia's failure to perform timely surveys or to submit budgets and perform line extensions to meet this demand is very troubling as it deprives Vermont residents of potentially valuable service.[34]

In addition, the Board expressed its continuing concern over Adelphia's practices.

> Rather than producing surveys in which the customer density is readily apparent and Adelphia can quickly identify segments that meet the Qualifying Density, the Company continues to prepare surveys that fail to achieve these purposes. We note that this is not a new problem, but represents a long-standing dispute between the Company and the Department that the Board has attempted to address in the past through certificate conditions.[35]

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31. Docket 5886, Order of 11/4/96. The agreement between Adelphia and the Department took the form of a Joint Proposal for Decision, which included specific terms and conditions that the parties asked the Board to incorporate into the Certificate of Public Good at issue in that docket.

32. Dockets 5847/5886, Order of 12/5/97, Attachment A. To be precise, Adelphia did not at that time "admit" to the violations, but rather Adelphia and the Department agreed that the enumerated violations would be "deemed proven" if Adelphia subsequently violated the terms of the Stipulation. In Dockets 6101/6223, the Board found that Adelphia had done so. Dockets 6101/6223, Order of 4/28/00 at 21. Thus, by Adelphia's subsequent actions, the Company's admissions to a large number of violations in the Stipulation became operative.

33. Dockets 6101/6223, Order of 4/28/00 at 18–21.

34. *Id.* at 84.

35. *Id.* at 114.

We also found that Adelphia's actions had produced direct impacts upon customers as a result, observing that in a high growth area, Colchester, Adelphia did not expand its system over a three-year period.[36] As a result of these concerns, the Board delineated more specific standards for House Count surveys and directed that Adelphia resubmit its 1999 surveys (that had been performed in 1998) within 90 days.[37]

The Department initiated Docket 6445 six months later, alleging that Adelphia had not complied with these mandates. In particular, the Department focused on Adelphia's failure to conduct its House Count surveys in accordance with the Board's Order. Once again, the Department and Adelphia negotiated a settlement of the issues. Adelphia acknowledged that it had not properly conducted house count surveys in the years prior to signing the settlement.[38] To remedy these failures, Adelphia established extensive new procedures for conducting and compiling future House Count Surveys and revised the 1999 survey to identify qualifying extensions that the Company may have missed.[39] The adoption of these new procedures finally brought Adelphia's practices into conformance with long-standing commitments in its Certificates. Adelphia's application of this new House Count survey methodology led to the Company identifying 1,622 miles of qualifying extensions (which were subsequently reduced to 1,523 miles when Adelphia did its strand mapping).[40] Adelphia committed to construct these line extensions within 21 months from June 15, 2001.[41] To date, Adelphia has constructed 338 miles of those identified, although 1,262 miles remain to be built.[42]

This record demonstrates that Adelphia's practices have been the primary cause of the current backlog of line extension miles. Had Adelphia adopted the appropriate procedures for House Count surveys and line extensions when it first committed to do so, many (and probably most) of the line extension miles identified in Docket 6445 would have been connected

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36. *Id*. at 114–115.

37. The Board embodied this requirement in Conditions 35 and 36 of its Order and Conditions 43 and 44 of the Certificate of Public Good.

38. Exh. DPS-18 at 15, 21, and 26.

39. Exh. DPS-19 at ¶ 3.

40. Exh. DPS-13, Tab H at 1, Tab G at 1, and Tab J.

41. Exh. DPS-13, Tab H at 1; DPS-13, Tab G at 1.

42. Tr. 2/27/03 at 168 (Snowdon); exh. Adelphia-3 at 32.

previously. The impact is obvious from examining the time at which Adelphia first identified the need to construct the currently backlogged line extensions. Of the approximately 1260 miles outstanding, Adelphia identified only 18 of them during the period of 1997 through 1999.[43] Adelphia found the vast majority of the outstanding line extensions *only after* the Company finally began modifying its methods for conducting house count surveys and line extensions.[44] We recognize that a portion of the recently identified miles may be a result of changes to the Qualifying Density. However, it is clear from the disparity in mileage that the vast majority of the large increase in identified miles arises from Adelphia's changes in practices, which began in 2000.

Adelphia argues that we should simply consider the 1260 miles as a current obligation. We reject this view. While we recognize that Adelphia now has the obligation to construct the 1260 miles of line extensions, we cannot ignore the events that led to that obligation. Adelphia voluntarily — and in knowing violation of Board Orders and the conditions of its franchise — chose a path that produced the current obligation. Adopting Adelphia's interpretation would also create incorrect incentives for cable companies and produce poor public policy. Rather than encouraging compliance with franchise obligations, ignoring the fact that Adelphia's actions produced the current backlog would *reward* Adelphia for its failure to comply with its commitments.

Cases under the UCC are consistent with our conclusion that Adelphia should not be excused from performance where it caused the circumstances. The UCC makes the excuse of performance dependent upon equitable principles and good faith. 9A V.S.A. § 2-615 note 6; note 5 states there is no excuse under this section "unless the seller has employed all due measures" to avoid breach. Commercial impracticability "doctrine is an equitable principle designed to excuse a party's innocent nonperformance, not to exonerate him for malfeasance." *Dow Chemical Pacific, Ltd. v. Rascator Maritime S.A.*[45] The "impossibility of performance . . . defense is traditionally unavailable where the barrier to performance arises from the act of the

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43. It is not clear why these were not constructed in a timely fashion after Adelphia identified them.

44. Larkin pf. at 38–39.

45. 782 F2d 329, 339 (1986, CA2 NY), *on remand on other grounds* (SD NY) 640 F Supp 882, *later proceeding on other grounds* (CA2 NY) 835 F2d 51, *and appeal after remand* (SD NY) 118 FRD 345.

party seeking discharge . . . ." *U.S. v. Winstar Corp.*[46] We reject Adelphia's claim in the present case that, having delayed construction of line extensions for years, it should now be allowed to reform the contract because of cost increases that occurred in the meanwhile.

We thus conclude that the current obligation to construct the line extensions identified in Docket 6445 is the direct result of Adelphia's actions extending back over a period of years. Had Adelphia complied with applicable requirements, the present backlog would be small, if not non-existent. Even if we found that unforeseen changed circumstances existed, we would still find that the need to alter the obligations to build the backlogged miles arose directly from events within Adelphia's control.

3. Increased Satellite Competition due to "Local into Local"

Adelphia cites to EchoStar's 2002 decision to begin offering "local-into-local" (i.e., satellite retransmission of local broadcast television stations) as an unforeseen changed circumstance beyond Adelphia's control. Adelphia says that it could not reasonably have anticipated EchoStar's offering of local-into-local service within its service territory as Adelphia expected that such competition would be restricted to larger markets. In addition, Adelphia states that local-into-local service "has had an adverse impact" on the Company's ability to obtain a fair return on its line extension obligations, citing to Adelphia's anticipated inability to attract as many customers.

EchoStar's offering of local-into-local in the Vermont market is certainly a change. For the first time, satellite providers can offer local channels, enhancing their ability to compete with Adelphia. The evidence, however, does not demonstrate that this change will have any material affect on Adelphia's ability to attract customers in the areas in which it will have. For example, Adelphia has presented no evidence that the advent of local-into-local has decreased the Company's subscriber base significantly or that it would lead to lower subscriber rates on new

46. 518 U.S. 839, 895, 116 S Ct 2432, 2465 (1996) (per Souter, J., with three Justices concurring and three Justices concurring in the judgment.).

line extensions over the long term.[47] The only quantitative evidence presented by Adelphia suggested that, at the present time, penetration rates on recently constructed plant are lower than they are for the business as a whole. Adelphia has not shown over what time period it measured these penetration rates or even that these lower penetration rates are related to local-into-local. More significantly, Adelphia has presented no evidence suggesting that lower penetration rates on line extensions is an aberration. In fact, we would expect that when Adelphia constructs a line extension, while some customers will rapidly take Adelphia's service, it may take a number of years before the penetration rates approximate the state-wide averages. Finally, Adelphia's non-quantitative assertions that local-into-local "has had an adverse impact" (which in fact rely primarily on the Company's future expectations), fail to consider that satellite services are not equivalent to Adelphia's cable offerings because satellite providers cannot now offer high-speed, two-way broadband services. Adelphia still derives a significant competitive advantage through its ability to offer Adelphia's PowerLink cable modem service. Nearly one-quarter of Adelphia's current customers take that service and the penetration rates have been rising noticeably.[48] Satellite customers cannot now obtain this service.

In addition, Uniform Commercial Code cases involving commercial impracticability requires that the changed circumstances be unforeseen. The evidence does not support a conclusion that EchoStar's offering of local-into-local was unforeseen. Congress specifically authorized local-into-local service in 1999 when it enacted the Satellite Home Viewer Improvement Act.[49] As of that time, Adelphia was well aware that satellite providers may begin offering the service at any time. Adelphia's own evidence suggests that the Company knew of the risks.[50] We recognize that Adelphia may not have known the precise time at which EchoStar or another satellite provider would actually enter the Vermont market. Adelphia was aware that

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47. Counsel for Adelphia suggested that they had evidence to this effect. However, the Company elected not to offer such evidence.

48. Tr. 2/27/03 at 154 (Snowdon).

49. The Satellite Home Viewer Improvement Act was enacted as Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 (relating to copyright licensing and carriage of broadcast signals by satellite carriers, codified in scattered sections of 17 and 47 U.S.C.), Pub.L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

50. Exh. Adelphia-1.

capacity constraints may slow competitive entry here. At the same time, changes in the telecommunications and cable industries have been rapid, with capacity increases the norm rather than the exception. Thus, Adelphia certainly should have foreseen that local-into-local would likely occur.

Finally, we note that our decision, discussed below, to alter the manner in which Adelphia counts houses with satellite dishes, will provide more than adequate relief for Adelphia from any effects that may result from local-into-local service.

4. Changes in the Capital Markets

Adelphia also states that there have been unforeseen changes in the capital markets that make it commercially impracticable to comply with the line extension obligations in the Certificate of Public Good. In particular, Adelphia states that there has been an unexpected increase in the cost of obtaining capital for cable system construction. Adelphia notes, however, that these changes are significant primarily because they show that the effects of the other changes (construction costs and local satellite competition) are not offset by savings from cheaper capital.[51]

We note first that the cost of capital has no impact on the Construction Factor that Adelphia seeks to change. Rather, the formula for calculating the Qualifying Density incorporates the cost of capital in the carrying charges — the "T" factor in the equation. Adelphia has not requested that we alter this factor. Thus, even if we found that changes in capital costs have occurred, it would not alter the Qualifying Density calculation.

Adelphia also has not met its burden of proving that nationwide reductions in the cost of borrowing since the commitments made in Dockets 6101/6223 would not have resulted in savings to the Company. Even if we accepted Adelphia's assertions that its current bankruptcy has made it more expensive to borrow funds than it would be otherwise, there is no evidence that such borrowing is more expensive than the cost of borrowing assumed in 2000.

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51. Adelphia Brief at 18.

Any increased borrowing costs arising from the Company's bankruptcy also clearly result from Adelphia's own actions and were thus within its control.[52] Adelphia's bankruptcy was precipitated by the actions of the Company's top corporate officers.

The record also supports the conclusion that Adelphia has adequate access to capital to conduct the line extensions. The Company has been able to obtain Debtor In Possession financing and now has substantial funds available.[53] These are adequate to meet the line extension obligations in the Certificate and do not support a claim of commercial impracticability.

5. Non-occurrence of Changed Circumstance as Assumption

Under Section 545(f), Adelphia must not only demonstrate that compliance with existing franchise requirements are commercially impracticable because of changed circumstances beyond the Company's control, but also that "the non-occurrence of [such changed circumstances] was a basic assumption on which the [franchise] requirement was based." Adelphia argues that it is generally accepted practice in commercial law that "the unforeseeability of the change was a basic assumption of the parties." Therefore, according to Adelphia, because the changed circumstances were unforeseeable and the franchises contain nothing that would counter this basic presumption, Adelphia asserts that the non-occurrence of the changed circumstances was a basic assumption in the Board's Order in Dockets 6101/6223.

We cannot accept Adelphia's argument that the "non-occurrence" test is met simply by virtue of unforeseeability. Adelphia's interpretation would largely eliminate this standard. However, Section 545 and cases under the UCC make clear that the assumption of a non-occurrence of changed circumstances is a separate and distinct element that Adelphia must show in order to demonstrate commercial impracticability.

Turning to the specific requirements that Adelphia asks us to modify, we find that the non-occurrence of changed circumstances was *not* a basic assumption of the requirement in the Certificate that Adelphia use a Construction Factor of $12,000 until the completion of the

52. Lackey pf. at 32.
53. Lackey pf. at 30–31.

upgrade. At that time, Adelphia presented evidence that it argued supported a Construction Factor of approximately $20,000. The Department argued for a lower figure. The Board adopted the $12,000 figure instead, for several reasons. First, Adelphia had committed to a significant upgrade of its overall system as the heart of its proposal to the Board in the franchise renewal request. The average cost of the facilities upgrade, according to Adelphia, was $12,000 per mile. Thus, this figure reasonably represented the construction costs.

Second, the Board expected that the facilities upgrade and Adelphia's line extensions would be coordinated, thus allowing the costs to be minimized. At the time of our Order, as we explained above, the Board expected that Adelphia had many miles of line extension that the Company should have constructed, but that because of failures in the House Count surveys, the Company had not yet identified. Prompt identification of these line extensions, as required through the mandate to revise the 1999 House Count Surveys, would have permitted Adelphia to jointly plan the upgrade and line extensions.[54] The Board, therefore, concluded that this joint planning would permit Adelphia to complete the line extensions at costs closer to those of the overall upgrade and required the use of the $12,000 Construction Factor. Significantly, the Board mandated this Construction Factor only during the period of the upgrade; it was expressly contemplated that, once the rebuild was complete, Adelphia could return to the Board to request an updated cost parameter.[55]

The Board's Order and the prohibition against changing it demonstrate clearly that because of Adelphia's past history and the ability to coordinate activities, the Board allocated the risk of increased construction costs during the upgrade period to Adelphia. Although not explicitly stated, the Board's prohibition effectively barred Adelphia from claiming increased construction costs during the upgrade period. The non-occurrence of changes to those construction costs was thus not an assumption of the Certificate.

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54. The evidence shows that Adelphia elected to treat the upgrade totally separate from line extensions, thus increasing costs. For example, Adelphia explained that it deliberately chose to complete the upgrade in Rochester before initiating the upgrade work. Tr. 2/27/03 at 219 (Forrest). This required duplicative work on part of the system, which could have been avoided by coordination. *Id*. at 212–219.

55. Dockets 6101/6223, Order of 4/28/00 at 116, 119.

This allocation of risks is consistent with § 2-615 of the UCC, whose goal is to apportion the hardship resulting from a change in circumstances in as fair a way as possible, substituting the law's judgement for what the parties would have done had they anticipated the change. The section itself suggests that "the seller may have assumed a greater obligation . . . ." The Department argues that, by accepting the terms of the Docket 6445 stipulation, Adelphia either waived its rights under § 2-615 (via § 545) or had accepted the risk of subsequent price increases, and we agree. The cases are very clear that a seller may, either directly or impliedly, accept a greater portion of the risks. See, for example, *U.S. v Wegematic Corp.*,[56] where the court applied the UCC as a source of federal common law in a case involving rights of the government under contract and held that a manufacturer that had promoted its computer system as a revolutionary breakthrough had thereby assumed the risk of practical impossibility within the meaning of UCC § 2-615. Adelphia argues in its Reply Brief that some statutory rights cannot be waived, and points to *Cable TV Fund v. City of Naperville*,[57] where the court held that a cable company could not waive its right to a 5% cap on franchise fees. We must distinguish two different kinds of waiver; while Adelphia might argue that its right to petition under § 545 cannot be waived, Adelphia certainly still can waive its defenses under UCC § 2-615, since that ability to waive is built into § 2-615.

Our conclusion also is consistent with case law under the UCC. For example, in *Publicker Industries Inc. v. Union Carbide Corp.*,[58] the federal District Court considered a breach of contract claim. The supplier, faced with large price increases for its main cost element, claimed that it would lose money due to these unforeseen changes. The Court noted that the contract contained a specific price ceiling, thus demonstrating the intent of the parties to allocate the risk of unforeseen price increases to the seller. Here, the Board's Order contains a similar price ceiling, applicable for a limited period of time, reflecting the Board's intent that Adelphia must bear the risk of price increases, but only during the period of the upgrade.

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56. 360 F2d 674 (2d Cir 1966).
57. 1997 WL 433628 (N.D.Ill. 1997).
58. 17 UCC Rep.Serv. 989 (E.D.Pa. Jan. 17, 1975).

6. Res Judicata, Waiver, and the Inapplicability of Section 545

The Department, in its opposition to Adelphia's request to modify its obligation to construct the lines identified in Docket 6445, argues that, notwithstanding the merits of Adelphia's claims, the Company is barred from obtaining relief under 47 U.S.C. § 545. The Department first claims that these commitments are in fact a contractual arrangement with the Department, not part of the Certificate, and thus cannot be modified under Section 545. Second, the Department asserts that Adelphia's modification request is barred by the principle of res judicata, since issues related to line extensions committed to in Docket 6445 were litigated and resolved in that case. Finally, the Department states that, even if Adelphia is not legally prevented from modifying the line extension obligations in Docket 6445, its voluntary entry into the Stipulation in Docket 6445 constitutes a knowing waiver of its right to seek such modifications.

We have evaluated the merits of Adelphia's claims in this Order, finding that Adelphia has not shown that compliance with the conditions in its existing Certificate is commercially impracticable. As a result, we do not need to reach a decision on the Department's other arguments.[59] We note, however, that Adelphia disagrees with the Department that it has waived its rights and argues that it may seek modification of the commitments it made in Docket 6445. In so doing, the Company is essentially seeking to unilaterally withdraw from the Stipulation resolving that case. Assuming Adelphia has not waived its right to withdraw from the settlement it made with the Department two years ago, such a withdrawal would also void the Department's decision not to pursue penalties under applicable provisions of Title 30. Thus, if Adelphia withdraws from the Stipulation, Adelphia could be subject to civil penalties for any violations that were addressed in that settlement.

Adelphia also asks that the Board modify any deadlines for construction of the required line extensions until one year from the Board's granting of its request. In addition, Adelphia seeks a further delay of such obligations until one year after there has been a determination of any

59. As we discussed above, the UCC is clear that a party may waive some or all of its rights. The voluntary Stipulation in Docket 6445, entered into to avoid potentially significant penalties, may well constitute such a waiver.

health risk associated with construction of a line extension. Adelphia asserts that it is possible that certain poles owned by Verizon are treated with creosote and could pose health risks.

We deny both of Adelphia's requests. As to the delay in construction deadlines, we have denied Adelphia's requested modification as to line extensions committed to by Adelphia in Docket 6445. We see no basis for further extending Adelphia's deadline for meeting those commitments. In reaching this decision, we are mindful of the long history, described above, which has led to a large backlog and has improperly deprived many Vermont consumers of cable service for a number of years. We also deny Adelphia's request for a delay in meeting its line extension obligations pending a determination on the health risks of certain creosote-treated poles. Adelphia has not presented sufficient evidence to demonstrate a health risk. In addition, the Company has not sought such a delay in other jurisdictions. We see no basis for granting such a request at this time. However, it is possible that Adelphia may encounter delays in the make-ready process resulting from refusal of the electric and telephone workers to work on creosote-treated Verizon poles. The Board presently has an active proceeding, Docket 6763, to consider problems arising from the presence of creosote on some poles; that case is still in discovery. The Board will reconsider modification of Adelphia's construction schedule if the record in Docket 6763 shows that construction generally has been affected, and if it appears that the line extensions are to be built in areas affected by Verizon's creosote-treated poles.

We find that Adelphia has not demonstrated that it is commercially impracticable for the Company to comply with its obligations under the Docket 6445 settlement, for the reasons set out above. The evidence presented by Adelphia is simply insufficient. Moreover, sound public policy supports our application of the UCC doctrines explained herein. The large backlog of miles exists primarily because of actions that the Company took over an extended period of time — actions that were inconsistent with Adelphia's obligations under its Certificate. Granting the relief requested by Adelphia would reward the Company for its failure to fulfill its obligations. As such, it could encourage Adelphia and other companies to simply delay compliance with any

conditions they do not like, hoping (or even expecting) that intervening events will shield them.[60] We do not find such an outcome reasonable.

B. Modification of Construction Cost Parameter for Post-Docket 6445 Miles

Adelphia also asks for use of updated cost data in determining its 2002 and 2003 construction responsibilities. As noted earlier, the Board always expected, under the Docket 6101 final order, that Adelphia could update the Construction Factor after completion of the system upgrades. As to current and future construction, therefore, the modification requested by Adelphia is really only a change to the time when updating may commence. Again as explained earlier, Adelphia has not demonstrated that any increased costs are either so extreme or so severe as to require modification of the franchise under § 545 and 2-615. However, the Department supports the modification as to the post-Docket 6445 construction, and the testimony indicated that this would not affect a large number of potential customers. The Board will, therefore, accept the modification as to post-Docket 6445 line extensions, and permit the Company to use a Construction Factor of $23,759 in its Qualifying Density calculation for extensions identified since Docket 6445.

However, we wish to emphasize that, in computing the parameters for the Qualifying Density formula, the values must be based upon similar (if not identical) time periods. That is, the testimony received at the hearing tended to show what the construction costs would be in the near future, but those costs were compared to revenues from several years ago. This is not consistent with our Order in Dockets 6101/6223 mandating use of recent revenues. We understand that the numbers were being used only for purpose of illustration, and that the actual computation of Qualifying Density would be performed later using more recent data. Still, we think it is well established, both in regulatory accounting and in the "real world," that, under generally accepted accounting principles, companies are expected to match, to the greatest extent possible, the revenues earned in a given time period with the costs incurred. If the revenue

60. Obviously, a company so acting could be subject to financial penalties. But the primary goal of most conditions in the Certificate is to ensure quality services to as many customers as is reasonable. After-the-fact penalties do little to help the customers adversely affected when companies choose not to meet their obligations.

parameter is to be based upon the previous year's financial reports, then the construction costs must be based upon the same year's historical costs, not upon the expected costs of construction that may not occur for a year or two. This is especially important because we expect that Adelphia's revenues will be showing a considerable increase because of the increasing popularity of its residential broadband service, PowerLink.

C. Treatment of Satellite Dishes in House Counts

Findings

27. Adelphia has asked that the Board allow it to count homes with Direct Broadcast Satellite dishes as one-third of a home when conducting its house count surveys.

28. Adelphia bases its request on the claim that its most recent extensions are averaging penetration rates of about 20%. Snowdon 12/18/02 pf. at 3.

29. Adelphia does anticipate that these extensions will achieve higher rates of penetration over time, but no higher than about 50%. Tr. 2/27/03 at 119 (Snowdon).

Discussion

Adelphia has requested a change in the way it performs house count surveys. When a house is observed to have an appurtenant satellite dish, Adelphia wishes to count only one-third house in its survey. In Docket 6101, Adelphia argued that such a dish-equipped house ought to be counted as one-quarter of a house. The Board rejected this position because the Company had "presented no evidence as to the penetration of cable service in these households or even the rough number of households that have satellite dishes that subscribe to satellite service." Docket 6101 Final Order at 116. The Company still has not presented evidence on those subjects in this case.[61] However, its petition here states that an unforseen circumstance justifies a modification of the Docket 6101 conditions. According to Adelphia, the unforseen circumstance is that, against all expectations, the satellite service available in Vermont now can include (at a small charge) the local broadcast channels, i.e., those broadcasting from Burlington and upstate New

61. Material submitted by Adelphia in its brief is not evidence.

York. It has, historically, been a major advantage of cable over satellite service that only cable carried the local channels.

We recognize that no party in Docket 6101 testified to an expectation of local channel availability on satellite service in Adelphia's territories, and that such satellite service is now available to some if not all customers. We do not accept that it is a change of such magnitude that it affects the value of the contract sufficient to trigger relief under UCC § 2-615; nor, as to the Docket 6445 line extensions, do we agree that the change is outside of Adelphia's control. As noted earlier, the line extensions at issue in that case should have been built in previous years. The failure to build them was solely within Adelphia's control. Presumably, had it built the extensions in a timely manner, it would have acquired customers before local channels on satellite became available.

As it may be applied to post-Docket 6445 line extensions, the Department has recommended that we accept Adelphia's proposed change. The record is devoid of any evidence that would demonstrate that counting a satellite-dish house as one-third house, as opposed to one-quarter or one-half, is anything other than an arbitrarily selected number. However, since this issue is no longer contested in the case before us, we choose not to disturb what appears to be a partial settlement.

The calculation of Qualifying Density shall be changed to count houses with satellite dishes as one-third house each, with the following conditions:

(1) the change applies to all Adelphia franchises, including any that may presently use a different fraction for counting dish-equipped houses;

(2) Adelphia shall track the penetration rate for these post-Docket 6445 line extensions as a group, including the number of satellite dishes used to modify its house count, so that the effect of satellite dishes upon sales of cable service can be determined. Adelphia shall file the results of this tabulation along with its annual report to the Department pursuant to 30 V.S.A. § 22.

D. System Upgrade Requirements

Findings

30. Adelphia is currently obliged to update its entire Vermont system to at least 750 MHz by December 31, 2003. Dockets 6101/6223, Order of 4/28/00 at 169–70; Dockets 6101/6223, Revised Certificates of Public Good dated 7/19/00 at ¶ 42.

31. Approximately one-third on the Montpelier system remains at 550 MHz while the other two-thirds is at 750 MHz. *See* Adelphia Petition dated 11/12/02 at 10.

32. Adelphia has not provided any proposal that specifies if and when it would be obligated to complete the upgrade of Montpelier in the future other than whether or not it makes sense in the Company's opinion to complete the upgrade. Tr. 2/27/03 at 86 (Snowdon).

33. All services currently provided by Adelphia are available throughout the Montpelier system, including the portion that remains at 550 MHz. *See* Adelphia Petition dated 11/12/02 at 10.

34. The Department suggests that, if the Board accepts Adelphia's modification to the franchise, that it be subject to the condition that the upgrade must be finished in time for the entire system to have sufficient capacity to carry any new services rolled out by Adelphia elsewhere in Vermont. Larkin 1/23/03 pf. at 6–7.

35. The Department's suggestion would not prohibit testing new services; instead, the obligation to upgrade the remainder of Montpelier is triggered by the Company's rollout of a new service that requires capacity in excess of the current 550 MHz. Tr. 2/28/03 at 15–16 (Larkin).

36. There are a few other isolated areas in Vermont that are also not yet upgraded to 750 MHz that are subject to the Docket 6101 requirements. Adelphia has not sought modification to its obligations with respect to these other areas. Larkin 1/23/03 pf. at 5; Adelphia Petition dated 11/12/02 at 10.

Discussion

Adelphia has asked to modify its Docket 6101 obligation to upgrade all of its Vermont systems to 750 MHz capacity. That obligation extended to all systems except Newport, which was then at 550 MHz capacity. By the terms of the Order in Docket 6101, Adelphia was to be allowed to file updated information for all of the Qualifying Density parameters once the rebuild had been completed. The actual modification sought by Adelphia, then, is in two parts:

(1) that Adelphia be excused from completing the rebuild of the Montpelier system until such time as the additional capacity is useful to deliver services to customers; and
(2) that Adelphia be deemed to have completed its rebuild for the purpose of permitting the calculation of Qualifying Density using updated information for all of the parameters.

On April 2, 2003, the Department and Adelphia filed a stipulation disposing of all contested issues on this modification. As stipulated by the parties, we grant Adelphia's modification request subject to the following conditions:

> Adelphia's obligation to complete the upgrade of the Montpelier system to at least 750 MHz should be suspended subject to condition.
>
> If Adelphia introduces a new product or service in Vermont and at least 50% of its subscriber base has access to such new product or service, and any subscribers to the Montpelier system are unable to receive the new product or service, or are unable to receive it at the same level of quality as other subscribers in the state, due to a lack of capacity in that portion of the Montpelier system that remains at 550 MHz, then Adelphia shall complete the upgrade of the remaining portion of the Montpelier system within six months of the date that the new product or service first became available to at least 50% of the Company's Vermont subscribers.

All other terms and conditions of ¶ 42 of the Revised Certificates of Public Good issued in Docket 6101 and dated 7/19/00 shall remain in effect.

V. CONCLUSION

We have found that Adelphia has failed to demonstrate that unforseen changes in circumstances have made its franchise or any portion thereof commercially impracticable to an extent that would justify relief under UCC § 2-615 and 47 U.S.C. § 545. However, we have accepted settlements reached between Adelphia and the Department that provide some relaxation of the build-out requirements in the future. We emphasize that a strong influence in our decision to accept these changes is that it will deprive relatively few Vermonters of the ability to obtain cable and high-speed internet service.

VI. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that the Certificates of Public Good issued to Better TV, Inc. of Bennington, FrontierVision Operating Partners, L.P., Harron Communications Corporation, Lake Champlain Cable Television Corporation, Mountain Cable Company, Multi-Channel TV Cable Company, Richmond Cable Television Corporation, and Young's Cable TV Corporation, all d/b/a Adelphia Cable Communications ("Adelphia") are hereby modified as follows:

1. When Adelphia next files its calculation of the Qualifying Density for the construction of post-Docket 6445 line extensions without customer contribution, it may use current data for all parameters in the formula. In particular, it may use a number for Cost of Construction in 2002 that does not exceed $23,759 per mile.

2. Consistent with the Order in Dockets 6101/6223, Adelphia shall file updated revenue calculations annually. To the extent that Adelphia seeks to modify other elements of the Qualifying Density formula, it shall base its adjustments on the same time period (to the extent possible). If audited financial statements are not available, the Company shall use unaudited numbers. The recalculation of the Qualifying Density shall be subject to adjustment and review by the Department and the Board.

3. Adelphia shall maintain and file annually a record of the nature and costs of each post-Docket 6445 line extension built.

4. In its count of houses performed to determine qualified post-Docket 6445 line extensions, Adelphia may count any house with an appurtenant satellite dish as one-third of a house.

5. Adelphia shall maintain and file annually a calculation of the penetration rate of line extensions built counting dish-houses as one-third of a house. The calculation shall be made to make the effect of the discount for satellite dishes identifiable.

6. Adelphia may postpone the upgrade of the remainder of the Montpelier system; in particular:

> Adelphia's obligation to complete the upgrade of the Montpelier system to at least 750 MHz is suspended subject to condition.

If Adelphia introduces a new product or service in Vermont and at least 50% of its subscriber base has access to such new product or service, and any subscribers to the Montpelier system are unable to receive the new product or service, or are unable to receive it at the same level of quality as other subscribers in the state, due to a lack of capacity in that portion of the Montpelier system that remains at 550 MHz, then Adelphia shall complete the upgrade of the remaining portion of the Montpelier system within six months of the date that the new product or service first became available to at least 50% of the Company's Vermont subscribers.

Dated at Montpelier, Vermont, this 11th day of April, 2003.

s/Michael H. Dworkin)
)
) PUBLIC SERVICE
)
s/David C. Coen) BOARD
)
) OF VERMONT
s/John D. Burke)

OFFICE OF THE CLERK

FILED: April 11, 2003

ATTEST: s/Judith C. Whitney
Acting Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: Clerk@psb.state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.